(26,372)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 381.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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1 I. *Petition and Exhibits, Filed June* 11, 1915, *and Amendment, Filed Dec.* 30, 1915.

In the Court of Claims, December Term, 1914.

No. 33079.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, a Corporation, et als.

VS.

THE UNITED STATES.

Petition.

1. The claimants, the Portsmouth Harbor Land and Hotel Company, a corporation, formed and existing under the laws of the State of Maine; Caroline E. Peabody, a single woman, a resident of Cambridge, County of Middlesex, Commonwealth of Massachusetts; Amory Eliot, a resident of Manchester, County of Essex, Commonwealth of Massachusetts, administrator of the estate of Mary Rantoul Peabody, deceased, formerly a resident of Cambridge, County of Middlesex, Commonwealth of Massachusetts; Samuel Ellery Jennison and Mary M. Jennison, his wife, residents of Kittery Point, County of York, State of Maine, respectfully represent as follows, to wit:

2. The claimants are all citizens of the United States, and residents respectively as stated in paragraph one hereof.

3. The claimants now have, proportionately to their ownership in the land hereinafter described at the time of the taking thereof by the United States, hereinafter set forth, and from the time of said taking have had, a just claim against the United States for the value of certain real estate, property, rights, privileges, and easements, and appurtenances thereto at Gerrish Island, County
2 of York, State of Maine, and hereinafter referred to as the claimants' land, taken by the United States for public use in the instalment, maintenance and use of a battery of guns, three ten-inch and other guns of smaller calibre at said Gerrish Island, known as Fort Foster, and established as a part of the fortification of the United States, for which none of them have received any compensation from the United States.

The claimants' land is situated on Gerrish Island, County of York, State of Maine, immediately adjacent to and adjoining the land of the United States on which Fort Foster is established; and the said claimants' land borders upon the Atlantic Ocean, and upon the entrance of Portsmouth Harbor, adjacent thereto, and intervenes be-

tween Fort Foster and the Atlantic Ocean in such wise that the guns of said fort cannot be fired to sea except over the intervening land of the claimants. If the guns are fired over that portion of the shore belonging to the Government reservation the fire of said guns is attended with great danger to the lives and property of the residents of the New Hampshire mainland, and is likewise attended with great danger to a certain lighthouse of the United States known as Whaleback Light by the destruction of said lighthouse and the lives of those within and about the same.

4. The United States established said fort with the intention and purpose of firing the guns thereof as needful for practice or for defense, across the claimants' land, and in establishing said fort the United States intended and purposed to take the land of the claimants when it should become necessary to fire said guns for the purpose of transit of projectiles from said guns.

5. It was needful to the United States in the use of said fort to fire the guns thereof across the claimants' land at any and all times in times of peace, and at all times for practice to fire the guns across said land and through the column of air superincumbent
3 thereon; and it was needful for the proper efficiency of said guns that the said guns be kept in readiness for accurate use by the United States and that they be used for practice from time to time continuously.

6. Said fort was established by the United States in the year 1900, and the guns therein set up in the year 1902 for the use of the United States and under authority of statutes duly enacted by the Congress.

7. The guns of said fort were discharged in times of peace by the United States in the year 1902 on or about the 22d day of June, and on or about the 25th day of September, respectively, at a target at sea, for the purpose of testing the carriages of the said guns. That between September 25, 1902, and February 20, 1905, repeated efforts were made to come to some settlement with the War Department but without success.

8. That on February 20, 1905, the present claimants brought suit in the Court of Claims against the United States. This suit was pending in the said court and on appeal in the Supreme Court of the United States until December, 1913.

9. On or about November 23, 1914, in a time of peace, the United States for the public use discharged all of said guns over and across the claimants' land, and through the column of air superincumbent upon said land; and since then has from time to time fired said guns as aforesaid.

10. All the claimants' land was land adapted to use for a summer residence and hotel property of the best class, and of little or no value otherwise; and was so used by claimants until 1905 when, on account of the apprehension of claimants and of those whom they invited to use said land that any time said guns would be fired over and across the said land, said land ceased to be used as a summer

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residence and hotel property and has since not been used for that purpose by claimants.

Said land, comprising the southern extremity of the State
4 of Maine fronting on the sea and the harbor of Portsmouth, New Hampshire, adjacent thereto, is of great natural beauty, consisting of rugged shore interspersed with sand beaches and gentle slopes of grass lawn, and certain groves of pine trees and elevations, the whole presenting especial attractions for summer residence. Said land contains a very valuable spring of pure water and a fine ice pond, a water supply system and four pumping stations, a hotel and eight cottages, stables, barns, ice houses, a steamboat pier, and other appurtenances, all of great value. Said land contains also a great number of sites for summer residences, of which a number were sold by your claimants at a price of not less than $3,333.33 per acre; and on certain of said sites sold by the claimants, expensive and beautiful summer residences were erected by the owners; and a number of said sites remain to be sold by the claimants. The area of the land belonging to the claimants was about two hundred acres, more or less. The said hotel and cottages were erected at a cost of not less than $75,000, not including certain buildings known as The Homestead, of considerable antiquity, which were on the land when it came into the possession of the claimants. Said land was laid out with roads and paths, and well kept until 1905, when, as aforesaid, by reason of the apprehension of the intention of the Government to fire with guns over said land, it became impossible to induce guests, tenants or purchasers to come on or to stay on said land.

10. On or about November 23, 1914, the United States took said land for the public use by discharging all of the said guns over and across it, and through the column of air superincumbent thereon, for the necessary purposes and use of the United States under the authority of Congress and by order of the War Department through the proper officers thereof.

From time to time the United States caused the said guns to be
5 raised, trained on and pointed at and across claimants' land at the buildings thereon, as if to be fired at or over the same, thereby dominating and impairing the use of said land by the claimants.

11. That the value of the claimants' land taken as aforesaid, is fairly and reasonably not less than seven hundred thousand dollars ($700,000), of which sum claimants as aforesaid have received no part in compensation.

12. By the acts of the United States aforesaid, the claimants are deprived of their land, and the United States has the use and domination of said land for the necessary purposes of said fort.

13. The claimants are the only owners of the claim here aforesaid as stated, and they have made no assignment or transfer of the same nor any interest therein, and they have at all times borne true allegiance to the United States, and have in no way aided or given encouragement to rebellion against the Government of the United States, and they are justly entitled to recover from the

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United States the amount here claimed after allowing all just credits.

14. The claimant, the Portsmouth Harbor Land and Hotel Company, became and is now the owner in fee simple of the land for the taking of which compensation is sought, on or about the 20th day of August, 1902, by a deed bearing date the 20th day of August, A. D. 1902, from one Samuel Ellery Jennison, which said deed was duly signed, sealed, acknowledged, delivered and recorded in book 525, page 293, of the Registry of Deeds of the County of York, State of Maine, a duly certified copy of which is attached hereto and named Exhibit A, and is requested to be considered a part hereof as fully as if incorporated herein at this point. The claimants, Amory Eliot and Caroline E. Peabody, are mortgagees of said land by virtue of deeds bearing dates respectively, the 30th day of December, 1897, the 3d day of February, 1914, and the 3d day of February, 1914, from S. Ellery Jennison, et ux., to Mary R. Peabody; the same being recorded in book 488, page 480, of
6 the records of the Registry of Deeds of the County of York, State of Maine; from Amory Eliot, administrator of the estate of Mary R. Peabody (the same being recorded in book 629, page 105, of the records of the Registry of Deeds of the County of York, State of Maine); and from the Portsmouth Harbor Land and Hotel Company (the same being recorded in book 619, page 266, of the records of the Registry of Deeds of the County of York, State of Maine) respectively; the grantee of the said deed dated December 30, 1897, being Mary R. Peabody, and the grantee of the two said deeds dated February 3d, 1914, being Caroline E. Peabody. All three of the said deeds here named attached hereto, and named respectively Exhibit B, Exhibit C and Exhibit D, *and* are requested to be considered as part hereof, as fully as if incorporated herein at this point. The claimants, Samuel Ellery Jennison and Mary M. Jennison, were owners in fee of said land up to on or about the date August 20th, 1902, when they conveyed the said land to the claimant, The Portsmouth Harbor Land and Hotel Company, as aforesaid. The title of said Samuel Ellery Jennison and Mary M. Jennison, his wife, was derived by purchase on or about the 8th day of February, 1884, by deed from Samuel Jennison to Samuel Ellery Jennison, recorded in Book 396, at page 235, Registry of Deeds, County of York, State of Maine, said Samuel Jennison having acquired title by purchase on or about the 22d day of May, A. D. 1883, by several deeds dated respectively, May 5th, May 12th and May 22d, 1883, and recorded in the Registry of Deeds of the County of York, State of Maine, as follows, respectively: Allen W. Burnham and Isabel G. Burnham to Samuel Jennison, May 5th, 1883, recorded in book 392, page 154; Allen W. Burnham, guardian of Emily G. Burnham, to Samuel Jennison, May 12th, 1883, recorded in book 392, page 210; Allan W. Burnham and wife, to Samuel Jennison, May 22d 1883, recorded in book 392, page 211, the original of all of which said deeds are in the possession of the claimants, who will produce the same at the proper time in evidence in this cause.

Wherefore the claimants pray that this honorable Court will find

that there is due to them the sum of seven hundred thousand
7 dollars, together with such other and further orders and findings of fact and of law as shall in the premises be warranted by and in conformity with law.

CHAUNCEY HACKETT,
Attorney of Record for Claimants.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me Chauncey Hackett, the attorney for the claimants, and makes oath that the facts herein stated are true to the best of his knowledge and belief.

Sworn and subscribed to before me this 11th day of June, 1915.

[SEAL.] J. CLARK MIDDLETON,
Notary Public, D. C.

EXHIBIT "A" OF PETITION OF PORTSMOUTH HARBOR LAND & HOTEL CO. ET ALS.

Know all men by these presents, That I, Samuel Ellery Jennison, of Kittery in the County of York and State of Maine, in consideration of one dollar and other valuable considerations paid by the Portsmouth Harbor Land and Hotel Company, a corporation organized under the laws of the State of Maine and located at Portland in the County of Cumberland in said State, the receipt whereof I do hereby acknowledge, do hereby give, grant, barg-in, sell and convey unto the said Portsmouth Harbor Land and Hotel Company its successors and assigns forever, all the real estate together with the buildings thereon which I own on Gerrish Island, so called, in said Town of Kittery, containing one hundred and eighty-five acres, more or less, and bounded and described as follows:

Beginning at the Westerly end of Gerrish Island, at the water and the Southerly boundary of the United States Government Military Reservation, thence running Easterly by the line of said Reservation and lands of Joanna E. McClure, of the heirs of Edward F. Safford, of Joseph B. Warner, of the heirs of Ephraim C. Spinney, of William C. Williams, and of the heirs of William M. Goodwin; thence Southerly by the land of the heirs of William M. Goodwin, to the Atlantic Ocean; thence running Westerly and Northerly by said Ocean and Portsmouth Harbor to the point of beginning, excepting and reserving from the premises as above described however, certain
8 lots which have heretofore been conveyed therefrom to George H. Higbee, to Henry N. Van Dyke, to Susanna Willard and others, to Olivia Flagg and to William L. White, as by the records of said several conveyances in the Registry of Deeds for said County of York will more fully appear.

The tract of land above described and conveyed is what was heretofore known as the "Seaward Farm" and includes the "Hotel Pocahontas" so called and the lot of about twenty acres upon which it stands and it is also intended to include a tract of about seven acres of salt marsh, surrounded by land of the heirs of William M. Good-

win, with right of way thereto. For a more particular description of said "Seaward Farm" reference is hereby made to a plan of the same made by Timothy Dame, surveyor, recorded in said York Registry of Deeds.

This conveyance is made subject to two mortgages thereon, one upon the said "Pocahontas Hotel" and lot to Mary R. Peabody for the sum of twelve thousand Dollars ($12,000.) and one to the Saco and Biddeford Savings Institution for twenty-two thousand dollars ($22,000.) which mortgages the said grantee, by the acceptance hereof agrees to assume and pay.

The grantor further reserves the free use and occupation of the bargained premises, with all the rents, issues, revenues and profits thereof to himself for the remainder of the current summer season until the first day of October A. D. 1902, without any liability for payment of rent to the grantee for such use and occupancy.

To have and to hold the aforegranted and bargained premises with all the privileges and appurtenances thereof, to the said Portsmouth Harbor Land and Hotel Company, its successors and assigns, to their use and behoof forever.

And I do covenant with the said Grantee its successors and assigns that I am lawfully seized in fee of the premises; that they are free of all incumbrances; except the two mortgages above specified that I have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that I and my heirs, shall and will warrant and defend the same to the said Grantee its successors and assigns forever, against the lawful claims and demands of all persons except those arising under said mortgages.

In witness whereof, we the said Grantor, and Mary M. Jennison wife of the said Samuel Ellery Jennison, in testimony of her relinquishment of her right of dower and all rights by descent or otherwise in the above-described premises, have hereunto set our hands and seals this twentieth day of August in the year of our Lord one thousand nine hundred and two.

SAMUEL ELLERY JENNISON. [SEAL.]
MARY M. JENNISON. [SEAL.]

Signed, Sealed in presence of
ARTHUR F. BELCHER to S. E. J.
LENA M. PEDERSEN.

9 STATE OF MAINE,
Cumberland, ss:

August 20, 1902, personally appeared the above-named Samuel Ellery Jennison, and acknowledged the above instrument to be his free act and deed.

Before me,

ARTHUR F. BELCHER,
Justice of the Peace.

Recorded according to the original received September 17, 1902, at 9 h. 15 m. A. M.
Attest:

JUSTIN M. LEAVITT, *Register.*

STATE OF MAINE,
York, ss:

Registry of Deeds,

December 18, 1914.

A true copy as recorded in Book 525, page 293.
Attest:

ELMER J. BURNHAM, *Register.*

EXHIBIT "B" TO PETITION OF PORTSMOUTH HARBOR LAND & HOTEL CO. ET ALS.

Know all men by these presents, That We S. Ellery Jennison and Mary M. Jennison his wife of Kittery in the County of York and State of Maine, in consideration of Twelve Thousand Dollars, paid by Mary R. Peabody of Cambridge, in the County Middlesex and Commonwealth of Massachusetts, single woman, the receipt whereof we do hereby acknowledge, do hereby give, grant, bargain, sell and convey unto the said Mary R. Peabody, her Heirs and Assigns forever, A certain tract of land on "Gerrish Island" in the town of Kittery, York County and State of Maine containing twenty acres, more or less, being part of the "Seaward Farm," and having thereon the Hotel Pocahontas with the stables, water works, bath and boat-houses and all other erections and buildings thereon. Said tract is bounded thus: Beginning at the Southwesterly corner of land of George H. Higbee at an iron pin thence running Northerly by said Higbee's land to the centre of a large stone post at the terminus of the public way leading to the Hotel Pocahontas; thence crossing said highway to the centre of a corresponding stone post on the opposite side of said public way; thence Northerly, bounded Easterly by other land of said mortgagor, in a straight line and in the same course as that of the Westerly boundary of said Higbee's land to the wall or fence of the United States Government land; thence along said United States Government land, Westerly, Southerly, and again Westerly to the sea-shore or ocean; thence by the shore and ocean Southerly and Easterly to a point on the line on the West of said Higbee's land thence Northerly on said line to the iron pin and point of beginning.

To have and to hold the aforegranted and bargained premises, with all the privileges and appurtenances thereof, to the said Mary R. Peabody, her Heirs and Assigns, to their use and behoof forever.

And we do covenant with the said Grantee her Heirs and Assigns, that we are lawfully seized in fee of the premises; that they are free of all incumbrances; that we have good right to sell and convey the same to the said Grantee to hold as aforesaid; and that we and our

Heirs shall and will warrant and defend the same to the said Grantee, her Heirs and Assigns forever, against the lawful claims and demands of all persons.

Provided nevertheless, That if the said S. Ellery Jennison his Heirs, Executors or Administrators pay to the said Mary R. Peabody, her Heirs, Executors, Administrators or Assigns, the sum of Twelve Thousand Dollars in three years from the day of the date hereof, with interest on said sum at the rate of six per centum per annum, payable semi annually, then this Deed, as also a certain promissory note bearing even date with these presents, given by the said S. Ellery Jennison to the said Mary R. Peabody to pay the sum and interest at the time aforesaid, shall be void, otherwise shall remain in full force. The grantor has the privilege of prepayment in sums not less than one thousand dollars on any interest day.

And the said Grantors hereby convenant and agree with the said Grantee that the right of redeeming the above mortgaged premises shall be forever foreclosed in one year next after the commencement of foreclosure by any of the methods now provided by law.

In witness whereof, we the said Grantors, and Mary M. Jennison wife of the said S. Ellery Jennison in testimony of her relinquishment of her right of dower in the above described premises, have hereunto set our hands and seals this thirtieth day of December in the year of our Lord one thousand eight hundred and ninety-seven.

S. ELLERY JENNISON. [SEAL.]
MARY M. JENNISON. [SEAL.]

Signed, Sealed and Delivered in presence of
MOSES A. SAFFORD.

STATE OF MAINE,
York, ss:

December 30, 1897. Then personally appeared the above named S. Ellery Jennison and Mary M. Jennison and acknowledged the above instrument to be their free act and deed.

Before me,
[L. S.] MOSES A. SAFFORD,
Notary Public.

Recorded according to the original received December 31, 1897, at 9 h. 14 m. A. M.
Attest:
JUSTIN M. LEAVITT, *Register.*

11 EXHIBIT "C" TO PETITION OF PORTSMOUTH HARBOR LAND & HOTEL CO. ET ALS.

I, Amory Eliot, administrator of the estate of Mary R. Peabody, late of Cambridge in the County of Middlesex and Commonwealth of Massachusetts, the mortgagee named in a certain mortgage from

8. Ellery Jennison and Mary M. Jennison, his wife, of Kittery in the County of York and State of Maine, recorded in York Registry of Deeds, Book 488, Page 480, in consideration of one dollar paid by Caroline E. Peabody of said Cambridge, the receipt whereof is hereby acknowledged, do hereby assign, transfer, and set over unto the said Caroline E. Peabody, the said mortgage deed dated December 30th, 1897, the real estate thereby conveyed, and the note and claim thereby secured.

To have and to hold the same to the said grantee and her heirs and assigns to their use and behoof forever; subject nevertheless, to the conditions therein contained and to redemption according to law.

In witness whereof, I hereunto set my hand and seal this third day of February, 1914.

AMORY ELIOT, [SEAL.]
Administrator of the Estate of Mary R. Peabody.

FRED'K GUTTERSON.

COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

Boston, February 4th, 1914.

Personally appeared the above named Amory Eliot and acknowledged the foregoing assignment to be his free act and deed as administrator.

Before me,

[L. S.] FREDERICK GUTTERSON,
Notary Public.

My Commission expires July 3, 1919.

Recorded according to the original received February 6, 1914, at 9 h. 40 m. A. M.

Attest:

FRANK D. FENDERSON,
Clerk of Courts, Acting as Register of Deeds Under the Provisions of Chapter 11, Section 8, of the Revised Statutes of Maine.

STATE OF MAINE,
York, ss:

Registry of Deeds,
December 18, 1914.

A true copy as recorded in Book 629, Page 105.

Attest:

ELMER J. BURNHAM, *Register.*

12 EXHIBIT "D" TO PETITION OF PORTSMOUTH HARBOR LAND & HOTEL CO. ET ALS.

Know all men by these presents, That The Portsmouth Harbor Land and Hotel Company, a corporation organized and existing under the laws of the State of Maine, and located at Kittery, in the County of York, in said State, in consideration of Two Thousand Dollars ($2,000), paid by Caroline E. Peabody, of Cambridge, in the County of Middlesex and Commonwealth of Massachusetts, the receipt whereof is hereby acknowledged, does hereby give, grant, bargain, sell and convey, unto the said Caroline E. Peabody, her Heirs and Assigns forever, a certain tract of land on Gerrish Island in the Town of Kittery, in said County of York and State of Maine, containing twenty acres, more or less, being a part of the "Seaward Farm" and having thereon the Hotel Pocahontas with the stables, water works, bath and boat houses, and all other erections and buildings thereon. Said tract is bounded thus: Beginning at the Southwesterly corner of land of George H. Higbee at an iron pin; thence running Northerly by said Higbee's land to the center of a large stone post at the terminus of the public way leading to the Hotel Pocahontas; thence crossing said highway to the center of a corresponding stone post on the opposite side of said public way; thence Northerly, bounded Easterly, by other land of said Mortgagor, in a straight line and in the same course as that of the Westerly boundary of said Higbee's land to the wall or fence of the United States Government land; thence along said United States Government land, Westerly, Southerly, and again Westerly to the sea-shore or ocean; thence by the shore and ocean Southerly and Easterly to a point on the line on the West of said Higbee's land; thence Northerly on said line to the iron pin and point of beginning.

To have and to hold the same, with all the privileges and appurtenances thereof, to the said Caroline E. Peabody, her Heirs and Assigns, to their use and behoof forever. And It do[es] covenant with the said Grantee, her heirs and Assigns, that It is lawfully seized in fee of the premises; that they are free of all incumbrances; except a prior mortgage of Twelve Thousand Dollars ($12,000) to Mary R. Peabody; that It has good right to sell and convey the same to the said Grantee to hold as aforesaid; and that It and Its successors will warrant and defend the same -o the said Grantee, her Heirs and Assigns forever, against the lawful claims and demands of all persons.

Provided, nevertheless, that if the said Portsmouth Harbor Land and Hotel Company, its Successors or Assigns pay to the said Caroline E. Peabody, her Heirs, Executors, Administrators or assigns, the sum of Two Thousand Dollars ($2,000) in six months from the day of the date hereof, with interest on said sum at the rate of six per centum per annum, payable —, then this Deed, as also a certain promissory note bearing even date with these presents, given by the said Portsmouth Harbor Land and Hotel Company
13 to the said Caroline E. Peabody to pay the sum and interest at the time aforesaid, shall both be void, otherwise shall remain in full force.

In witness whereof, The name and seal of said Corporation is hereunto affixed, countersigned by its President and Treasurer, duly authorized this third day of February, in the year of our Lord one thousand nine hundred and fourteen.

PORTSMOUTH HARBOR LAND & HOTEL CO.,
By FREDERICK M. SISE, *President.* [L.S.]
S. ELLERY JENNISON, *Treasurer.*

STATE OF MAINE,
County of York, ss:

February 3d, 1914.

Then personally appeared the above-named Fred M. Sise, President, and S. Ellery Jennison, Treasurer, and acknowledged the foregoing instrument to be their free act and deed in their said capacities and the free act and deed of said Corporation.
Before me,

AARON B. COLE,
Justice of the Peace.

Recorded according to the original received February 6, 1914, at 9 h. 40 m.
Attest:

FRANK D. FENDERSON,
Clerk of Courts, Acting as Register of Deeds Under the Provisions of Chapter 11, Section 8, of the Revised Statutes of Maine.

14 II. *General Traverse.*

Court of Claims.

No. 33079.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, a Corporation, et als.

VS.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

15 III. *Substitution of Attorney of Record.*

On December 8, 1917 Frank W. Hackett, esq., was substituted as attorney of record, on motion filed that day and allowed by the court.

IV. *Argument and Submission of Case.*

On December 10, 1917 the case was argued and submitted on merits by Mr. John Lowell, for the claimants, and Mr. Harvey D. Jacob, for the defendants.

16 V. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Barney J.*

Filed February 25, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The Portsmouth Harbor Land & Hotel Co., hereinafter designated the "claimant company," is a corporation organized and existing under the laws of the State of Maine; Caroline E. Peabody is a single woman and a resident of Cambridge, Mass.; Amory Eliot, of Manchester, Mass., is the administrator of the estate of Mary R. Peabody, late a resident of Cambridge, Mass.; and Samuel Ellery Jennison and Mary M. Jennison, his wife, are residents of Kittery Point, Me.

All of the claimants are citizens of the United States.

II.

At the time of the allleged taking of property by the United States herein complained of, the said Portsmouth Harbor Land & Hotel Co. was, and had been since August 20, 1902, the owner, by conveyance from the said Samuel Ellery Jennison and wife, of a certain tract of land in York County, Me., more particularly described as follows:

All of that tract and parcel of land formerly known as the Seaward Farm on Gerrish Island, in the town of Kittery, county of York, State of Maine, containing 200 acres, more or less, with all the buildings, erections, and improvements thereon, and bounded as follows, to wit: Beginning at the west end of Gerrish Island at the water and southerly boundary of the United States military reservation, thence running easterly by the line of said reservation and the lands of Joanna E. McClure, of the heirs of Edward F. Stafford, of Joseph B. Warner, of the heirs of Ephraim C. Spinney, of William C. Williams, and the heirs of William H. Goodwin; thence
17 southerly by the land of the heirs of William H. Goodwin to the Atlantic Ocean; thence running westerly and northerly by said ocean and Portsmouth Harbor to the point of begin-

ning, excepting and reserving from the premises as above described, however, certain lots which have heretofore been conveyed therefrom to George H. Higbee, to Henry N. Van Dyke, to Susanna Willard et al., to Olivia Flagg, and to William L. White. About 179 acres of this land lies above high-water mark, the remainder being between high water and low water.

III.

Said land on its southerly and easterly fronts borders on the Atlantic Ocean, and on its westerly front borders on the entrance to Portsmouth Harbor, and is about 3 miles from the city of Portsmouth, N. H. It is especially adapted to use for summer-resort purposes, and is otherwise of comparatively small value.

Since the year 1885 portions of it have been devoted to summer-resort purposes, and at the time of the alleged taking of it by the United States in November, 1914, said land was improved by a large summer hotel known as the Hotel Pocahontas, built about 1885; a number of summer cottages, built between about 1885 and 1895; a pier adjacent to the said hotel; and a number of small buildings and other improvements appurtenant to said hotel and cottages. Said land, including the improvements thereon, was, at the time of the alleged taking, reasonably worth the sum of $125,000.

IV.

The Saco & Biddeford Savings Institution, of Saco, Me., on June 21, 1915, was the holder of a mortgage upon the easterly 155 acres, more or less, of the land here in suit, executed by said Samuel Ellery Jennison and wife on January 22, 1900, to secure the payment to said savings institution of an indebtedness of said Jennison to it in the sum of $22,000. The said Jennison having long been in default in the payment of this indebtedness, said savings institution, on said June 21, 1915, foreclosed the mortgage and took possession of said land, which possession has since continued, the mortgagor's right of redemption not having been exercised within the time allowed therefor. Said land was bounded as follows: Beginning at an iron bolt set in stone at the seashore on the easterly line of land of G. H. Higbee, thence running northerly by said Higbee's land to the highway; thence from the northerly line of said way indicated by stone posts, northerly and parallel with the westerly boundary of said Higbee's land to the Government reservation; thence easterly by said reservation and lands of Joanna E. McClure, heirs of Edward F. Stafford, Jos. B. Warner, heirs of E. C. Spinney, Wm. C. Williams, and heirs of Wm. H. Goodwin; thence extending southerly by land of said Goodwin heirs to the Atlantic Ocean; thence extending westerly by said ocean to the point of beginning, excepting therefrom lots sold to H. N. Van Dyke, Susanna Willard et al., and Olivia M. Flagg, also the town way extending through the same. The summer cottages referred to in Finding III above are located on this tract of

land; and said land, together with the improvements thereon, was at the time of the taking alleged in this cause worth the sum of $75,000.

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V.

The claimant Caroline E. Peabody is interested in the remaining and westerly 20 acres of land, more or less, of the 179 acres here in suit as mortgagee under a mortgage from the claimant company, dated February 3, 1914, to secure a debt to her from said company in the sum of $2,000; and she is also further interested in said land to the extent of $12,000 as assignee of Amory Eliot, administrator of Mary R. Peabody, deceased, of an outstanding mortgage indebtedness of $12,000 against said 20 acres of land, incurred by the said Samuel Ellery Jennison and wife on December 20, 1897, prior to their conveyance of said land to the claimant company. Said 20 acres of land, more or less, was bounded as follows: Beginning at the southwesterly corner of land of George H. Higbee at an iron pin; thence running northerly by said Higbee's land to the center of a large stone post at the terminus of the public way leading to the Hotel Pocahontas; thence crossing said highway to the center of a corresponding stone post on the opposite side of said public way; thence northerly, bounded easterly by other land of said mortgagor, in a straight line and in the same course as that of the westerly boundary of said Higbee's land to the wall or fence of the United States Government land; thence along said United States Government land westerly, southerly, and again westerly to the seashore or ocean; thence by the shore and ocean southerly and easterly to a point on the line on the west of said Higbee's land; thence northerly on said line to the iron pin and point of beginning.

The pier and summer hotel referred to in Finding III above are located on this 20-acre tract of land, and said land, together with the improvements thereon, was, at the time of the alleged taking of the same by the United States in 1914, of the value of $50,000.

VI.

Pursuant to appropriations by Congress for the establishment of a fortification on Gerrish Island, the United States in May, 1873, purchased a tract of land containing approximately 40 acres on the west shore of said island and began the construction thereon of a battery which was to form a part of the defenses of Portsmouth Harbor. In 1876, however, work was suspended on account of the failure of Congress to provide the necessary funds for the prosecution of the work. In 1898, pursuant to an appropriation by Congress therefor, work was resumed and a fortification having a battery consisting of three 10-inch guns mounted on disappearing-gun carriages, and a battery of two 3-inch rapid-fire guns, was constructed. The installation of these batteries was completed about June 30,

1901, and they were transferred to the artillery branch of the service on December 16, 1901, the fortification being named Fort Foster.

This tract of land upon which Fort Foster is located lies immediately to the north of the western portion of the land of the claimant company in suit in this case, the westernmost portion of the company's land being between the reservation and the sea. The fort is located back about 500 feet, northerly, from the shore line at the southwesterly corner of the reservation and about 300 feet from the nearest point of the claimant company's land, and
19 is about 1,200 feet distant from the company's said summer hotel to the southeast thereof, which is the nearest of the company's main buildings to the fort. The location of the reservation, fort, and battery with reference to the claimant company's said land, hotel, cottages, and pier is shown by the accompanying plat, which is hereby made a part of these findings of fact.

VII.

The guns of the 10-inch battery installed in Fort Foster have a range of fire and can be fired over and across practically all portions of the sea front of said land of the claimant company.

If the dividing line between the claimant company's land and the Government reservation between high-water and low-water marks is a continuation in the same direction of the undisputed dividing line between said premises running down to high-water mark, as illustrated by the line A to I on said accompanying plat, none of the guns of Fort Foster could, with safety to the residents of adjacent shores, be fired toward the sea without the projectiles therefrom passing over and across some part of the company's land.

If, however, said dividing line between high-water and low-water marks from the point of termination at high-water mark of the undisputed dividing line, is a line bisecting the angle resulting from lines diverging from said point of termination at right angles, respectively, to a base line drawn from the two shore corners of the tract of land in suit, and a base line drawn from the shore corners of the Government reservation, as illustrated by the line A to F on said plat, guns No. 1 and No. 2 could be fired to sea without endangering persons or property on adjacent shores. Gun No. 3, as at present installed in said fort, could not be so fired with safety except at long-range distances.

In the conveyance to the United States of the land constituting said reservation, the said dividing line approaching the sea or harbor on the south of the reservation was specified to extend westerly "to the seashore," and the description of the land conveyed terminated with the provision, "together with the flats appurtenant thereto."

From about the year 1879 to about 1904 the owners or occupants of the land in suit here, for the purpose of preventing the wandering of cattle on or off said land, had a wire fence of a more or less permanent character connecting at high-water mark with the westerly end of the south boundary fence of the reservation and

continuing on in the same direction as said fence down to low-water mark, as indicated by the line A to I on the plat referred to above.

VIII.

Fort Foster was never garrisoned, and no target or practice firing was ever done there. Until the summer of 1917, when its guns were dismounted for removal and use elsewhere, its batteries had been continuously kept in serviceable condition for defensive use, this being done by a small detail from Fort Constitution, just across the harbor from Fort Foster.

Prior to and during the time in question in this suit it was, and still is the policy and practice of the military authorities of the United States not to maintain garrisons and train gun crews at all of its coast fortifications, but to maintain garrisons and do such training at fortifications where the facilities for training are best and where there would be less objection and complaint by nearby residents on account of the noise and concussion resulting from practice firing, and also to discontinue practice firing at forts where there was or is serious objection and complaint against it. Gun crews for such fortifications are given gunnery practice at other forts.

IX.

The only shots that have at any time been fired from said guns at Fort Foster, and the reasons therefor, and the tangible effects thereof as regards the property of the claimant company, are as follows:

On or about June 20, 1902, one shot was fired from gun No. 1, and one shot from gun No. 2; and on September 26, 1902, one shot was fired from gun No. 3, which was the easternmost gun of the battery. These shots were fired for the purpose of testing the guns and their carriages and installation generally, and the direction of the firing was such that the projectiles therefrom passed over and across the western extremity of the land here in suit.

On November 23, 1914, one shot was fired from gun No. 1, and two shots from gun No. 2; on August 26, 1915, two shots were fired from gun No. 3; and on November 19, 1915, one shot was fired from gun No. 2. These shots were fired for the purpose of testing certain modifications of the gun carriages, made shortly prior thereto. It does not appear that any damage to the buildings or other improvements on the claimant company's land resulted from the concussion from said shots in 1914 and 1915.

X.

In the firing of a 10-inch gun the gases, or blast, from the burning powder charge follows the projectile from the gun for some distance at a great but rapidly diminishing velocity, expanding and covering a gradually widening area along the line of fire.

XI.

If the boundary line between Fort Foster Reservation and the claimant company's land from high-water mark down to low-water mark was as illustrated by the line A to I on the accompanying plat hereinbefore referred to, all six of the said shots fired in 1914 and 1915 were fired over and across the westernmost 2 acres of the claimant company's land. One-fourth of an acre of this land was above mean high water and the remainder of it between mean high water and low water, and its entire value was $300. And if said boundary line be as above stated, the quantity of the claimant company's land more or less affected by the blast from the guns in said firing passing over it in the manner indicated by Finding X above, was ap-
21 proximately 8 acres of the westernmost part of it, 3 acres of which was above mean high water and the remainder between high water and low water, and the value of all of which was $2,500.

If, however, the said boundary line between high water and low water ran as illustrated by the line A to F on the accompanying plat hereinbefore referred to, none of the shots fired in 1914 was fired across said land, and the only shots shown to have been fired over said land since the firing of 1902 were the two shots fired from gun No. 3 in August, 1915, the quantity of land so fired over being approximately one-half of an acre. One-half of this land was above high water and the remainder between mean high water and low water, and it was of insignificant value. And if said boundary line be as above stated—that is, on said line A to F—the quantity of the claimant company's land affected by the blast from said firing was approximately 6 acres of the westernmost part of said land, 3 acres of which was above mean high water and the remainder between mean high water and low water, and the value of all of which was $2,400.

None of the claimant company's said buildings or structures was on the land so fired over or affected by the blast from said guns.

XII.

In the firing of said guns in 1914 and 1915, the officers and agents of the United States especially desired, intended, and took precautions so to fire them, and believed they were so firing them, as to avoid firing any of them over any part of the claimant company's land; and such firing as was done over said land was due to a misunderstanding on the part of said officers and agents as to the boundary lines of said land.

XIII.

In the firing of said guns, notice was first given by the officers of the United States to all near-by residents, including the occupants of the hotel and cottages on the land in suit, that such firing was to take place, such notice being given in order that they might not be alarmed or frightened by the firing, and also that they might, by

the opening of doors and windows, avoid possible damage to property by the concussion from such firing.

XIV.

In the manipulation of said guns by the detail charged with keeping them and their carriages in serviceable condition the guns, while not loaded, were pointed in various directions over and across the land of the claimant company, and sometimes in the general direction of buildings thereon, but at no time with any intention of firing them other than when they were, after notice, fired over the westernmost point of said land as in the findings hereinbefore set forth.

XV.

Fort Foster was not constructed for the purpose of firing any of its guns over and across any of the plaintiffs' lands in time of peace, or of so firing them at all, except over the Government's own premises occasionally for testing purposes.

22 XVI.

The value of the land and property in suit consists almost entirely in its adaptability and desirability as a summer resort; and frequent firing of said guns of Fort Foster would result in the impairment of said value.

There are numerous successfully operated summer-resort hotels and properties in the United States situated with reference to various United States coast-defense fortifications and batteries of heavy guns substantially as the claimant company's hotel and property is situated with reference to said Fort Foster and its batteries.

XVII.

The claimant company was organized by the said Samuel Ellery Jennison for the purpose of taking over from him the land and property here in suit and continuing its operation as a summer resort. Said property had theretofore, from about 1885, been owned and operated by said Jennison, and he was the principal stockholder of the company and the manager of said company and property after the organization of the company and its taking over of the property in 1902.

XVIII.

Said hotel and property was operated as a summer resort up to the end of the season of 1904. In 1905 said Jennison, together with other collaterally interested parties, brought suit in this court against the United States, alleging a taking from him by the United States of the property here in suit by the said firing of the guns of Fort Foster over it in 1902. The claimants' petitions were dismissed by

the court (Peabody's Case, 46 C. Cls., 39); and upon appeal to the Supreme Court the decision of this court was affirmed, 231 U. S., 530.

The operation of said hotel and property during the season of 1902 was financially successful, and during the season of 1903 the hotel and cottages were patronized by a normal number of guests and tenants. The season of 1904 was financially unsuccessful, and the hotel and property was thereafter abandoned by the claimant company as a summer resort, with the exception of the occasional renting of some of the cottages.

The suspension of the operation of the hotel and property after the year 1904 was due partly to a lack of financial success in its operation during the year 1904, and partly to the advice of counsel for Jennison in his suit against the United States referred to above.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that no part of the plaintiffs' property has been taken by the Government, and that the petition should be, and the same is hereby, dismissed.

Judgment is entered against the plaintiff for the cost of printing the record in this cause in the sum of five hundred and sixty dollars and ninety-one cents ($560.91).

23 *Opinion.*

BARNEY, J., delivered the opinion of the court.

A suit nearly identical with this except as to parties and involving the same questions of law to be decided, was before this court before and the petition dismissed (Peabody v. United States, 46 C. Cls. 39), and subsequently appealed by the plaintiff to the Supreme Court, wherein the judgment of this court was affirmed (231 U. S. 530).

Of course the judgment in that case settles all of the questions of law applicable to the facts as therein found, and it is only necessary to discuss and decide as to facts as found in this case other and different from those found in the Peabody case.

The facts involved in the Peabody case are stated by this court in its opinion as follows:

"In the month of May, 1873, the Government purchased a tract of land containing about 70 acres on what is known as Gerrish Island, which is located at the extreme southwest extremity of the State of Maine, at the mouth of the Piscataqua River, and is only separated from the mainland at high water by a narrow inlet. In the following year it began the erection of a battery on this reservation and continued operations to that end until about the year 1876, up to which time about $50,000 had been expended in the work. It does not appear that up to the latter date any guns had been installed in the battery, and the work seems to have been abandoned or neglected until 1898, when an allotment was made for the completion of this battery, and in pursuance thereto a battery consisting of

three 10-inch guns was constructed on the old site. This battery was completed about June 30, 1901, and named 'Fort Foster,' and is a part of the defenses of Portsmouth Harbor, which begins at the mouth of the Piscataqua River.

"In 1883 the claimant Jennison became the owner of about 200 acres of land on Gerrish Island, situated south and west of the Government reservation and fronting about 1 mile on the Atlantic Ocean. This land is peculiarly adapted for use as a summer resort on account of its shore front, bathing beaches, timber, springs, etc., and is otherwise of little value. The next year Mr. Jennison began the erection of a summer hotel thereon called the Pocahontas, which has been added to from time to time since, till at the time of the alleged taking it contained 90 guest rooms and had cost about $50,000. In the meantime he also built and furnished several cottages on this land to rent during the summer season, at a cost of about $16,000. This hotel and the cottages had been yielding Mr. Jennison considerable profit for several years prior to the alleged taking of the land by the Government. The hotel and cottages were built and in operation for some years before the reconstruction of Fort Foster, as stated, and the fort is located within 200 feet of the northwest corner of the claimant's land and within 1,000 feet of the hotel.

"In the month of June, 1902, the soldiers stationed at Fort Foster fired two of the guns there installed, for the purpose of testing the same, over and across the premises of Mr. Jennison at a target located several miles off the shore, and fired the other gun in the same manner in the month of September following. The effect of this firing, by way of concussion, was to do considerable dam-
24 age to the hotel and cottages by disturbing the foundation of the hotel, breaking glass, etc. None of these guns have since been fired, but they are kept in constant condition by a detail from a neighboring fort.

"It appears from the findings that the erection of this fort and the installation therein of said guns in the manner stated has materially impaired the value of claimant's land by standing as a constant menace to its quietude as a summer resort and thereby keeping from it probable guests and purchasers. The question, then, before us is: Whether such impairment of value brought about in the manner stated is a 'taking' of the property of the claimants within the fifth amendment of the Constitution?

"In an attempt to make the averment in the amended petition in this suit set forth a taking of claimants' property within the meaning of the law, the substantial statement in that regard is that it was and is the intention and plan of the Government to fire the guns of Fort Foster over and across the premises of the claimants for practice and other purposes, and that none of said guns can be so fired for any effective purpose without the projectiles from the same passing over the claimants' intervening land, and evidence has been furnished to sustain this averment.

"The findings show (and there appears to be no dispute upon this subject) that if the dividing line between claimants' land and the Government reservation between high and low water mark is a con-

tinuation in the same direction of the undisputed dividing line between said premises above high-water mark, the guns of this fort can not be fired toward the sea without the projectiles therefrom passing over and across claimants' land. On the other hand, however, the findings show that if the undisputed boundary line between the claimants' and the Government's land terminates at high-water mark, and the boundary line between them from said point to low water is the line bisecting the angle formed by two lines drawn from said point to low-water mark, one at a right angle to a base line drawn between the two extreme points where the claimants' land touches the shore line at high water, the other at a right angle to a base line drawn between the two extreme points where the Government's land touches the shore at high water, the guns of said Fort Foster may be fired for practice and for all other necessary purposes in time of peace without the projectiles passing over and across claimants' land."

Thereinafter follows a discussion of the law applicable to the question of boundaries and wherein it was decided that under the decisions of the court of Maine, which were decisive of this question, the latter method of determining the boundary line must be adopted. The width of this part of said flats so belonging to the Government was not found, but it was found that it was extensive enough so that "the guns from Fort Foster may be fired for practice and for all other necessary purposes in time of peace without the projectiles from the same passing over or across the plaintiffs' land."

The above decision of this court in the former case does not appear to be questioned by the plaintiffs and if it were it would be reaffirmed in the instant case.

25 The facts as found in this case do not in our opinion vary in substance from those found in the Peabody case, but such variances as they may appear will be noted and discussed in this opinion.

(1) The findings show that the grantors of the plaintiffs built and maintained a fence between high and low-water mark extending the southerly line between the Fort Foster Reservation and the plaintiffs' lands on Gerrish Island, and that this fence was maintained from 1876 to 1902. The location of this fence is indicated by the line A-I on the map herewith. If this fence should now be regarded as the line between the plaintiffs' lands and the Fort Foster Reservation, no guns from such fort could be fired therefrom in any direction except to the westward without the missiles therefrom passing over the plaintiffs' lands. In short, this boundary line would cut the Government off from any of the tidewater lines in question except to the westward of the reservation.

It thus becomes important to decide whether the building and maintaining of this fence will change the rule as to the proprietorship in tidewater lands by riparian owners as laid down in the former case, this rule having been determined from the decision of the courts of the State of Maine, where this land is located.

Where it is impossible to determine the boundaries of a parcel of land from the call in the deed, stones, monuments, fences, and other

evidences of a boundary established and agreed upon by the parties to the conveyance are evidence of such boundary. Hoffman v. Port Huron, 102 Mich. 417; Knowles v. Toothacher, 58 Maine, 172. But when such boundary can be determined from the call in the deed a boundary fence agreed upon by the adjoining parties as the true line, but which varies from the true line, fixes such new boundary only after adverse possession for the statutory period. Horlamus v. Hacker, 69 Wis. 280; Bader v. Zeise, 44 Wis. 96; Phelps v. Henry, 15 Ark. 297.

The boundary of the Fort Foster Reservation which determines where its easterly boundary line reaches low-water mark under the rule as laid down by the courts of Maine and adopted by this court in Peabody v. United States, 46 C. Cls. 39, is obtained from the deed to the United States of the lands intended to be included in the reservation. As there is no such thing as obtaining title from the United States by adverse possession, such boundary must prevail, notwithstanding any fence erected by the plaintiffs or their grantors indicating any other boundary line. Jourdan v. Barrett, 4 How. 67; Frisby v. Whitney, 9 Wall. 187.

It follows from the foregoing that the proprietorship in the tidewater lands to the south of Fort Foster as determined in the Peabody case remains unchanged by the new evidence and that the Government is the proprietor of sufficient territory over and across which to fire its guns at Fort Foster to the southward.

(2) The findings show that the Government fired guns from Fort Foster as follows: November 23, 1914, No. 1 gun, one shot; No. 2 gun, two shots; August 26, 1915, No. 3 gun, two shots; November 19, 1915, No. 2 gun, one shot. Before these shots were fired the officer in charge placed a flag where he believed the line to be between the Government's and the plaintiffs' lands and directed the gunners to fire to the westward of such flag so that the missiles would all
26 pass over the Government lands, but it appears that by mistake this flag was placed too far to the east so that at least one of such shots passed a few feet over the tidewater lands of the plaintiffs. Before firing these guns the officer also sent messengers to the hotel and other residences on Gerrish Island to warn the people there that these guns were to be fired, but the hotel having been unoccupied for years of course they found no one there. The findings do not show that these shots did any injury to the residences on the island or caused any inconvenience to any people thereon. These were the only times any firing was done at this fort since 1902, and were all fired for testing purposes.

(3) The findings also show that Fort Foster is not maintained for practice or target shooting and the guns there are only fired for testing them and very seldom for that purpose.

The findings show several mortgages existed on a large part of the premises in question one of which appears to have been foreclosed and the mortgagee now in possession, and if eventually the plaintiffs should recover in this suit the question of the different interests in the lands alleged to have been taken by the United States will have

to be considered, but the present disposition of this case makes such action unnecessary.

The fundamental question before the court to be decided in this case is whether the facts as found show a taking by the United States of any of the property of the plaintiffs. That question is to be decided in the light of the opinion rendered by the Supreme Court in the Peabody case, supra, only excepting as the rule therein announced may be rendered inapplicable by the new facts found in this case.

In that case, by Hughes, J., the court, after reciting the facts, said (p. 538):

"The question is whether upon this showing the petitioners were entitled to recover.

"It may be assumed that if the Government had installed its battery, not simply as a means of defense in war, but with the purpose and effect of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise, whenever it saw fit, in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a 'taking' within the principle of the decisions (Pumpelly v. Green Bay Co., 13 Wall. 166, 177, 178; United States v. Lynah, 188 U. S. 445, 469; United States v. Welch, 217 U. S. 333, 339) and not merely a consequential damage incident to a public undertaking which must be borne without any right to compensation (Transportation Co. v. Chicago, 99 U. S. 635, 642; Gibson v. United States, 166 U. S. 269; Scranton v. Wheeler, 179 U. S. 141, 164; Bedford v. United States, 192 U. S. 217, 224; Jackson v. United States, 230 U. S. 1, 23).

"But, in this view, the question remains whether it satisfactorily appears that the servitude has been imposed; that is, whether
27 enough is shown to establish an intention on the part of the Government to impose it. The suit must rest upon contract, as the Government has not consented to be sued for torts even though committed by its officers in the discharge of their official duties (Gibbons v. United States, 8 Wall. 269, 275; Langford v. United States, 101 U. S. 341, 343; Schillinger v. United States, 155 U. S. 163, 169; Russell v. United States, 182 U. S. 516, 530; Harley v. United States, 198 U. S. 229, 234); and a contract to pay, in the present case, cannot be implied unless there has been an actual appropriation of property. United States v. Great Falls Mfg. Co., 112 U. S. 645, 656, 657.

"The contention of the petitioners, therefore, is plainly without merit so far as it rests upon the mere fact that there is a suitable, or the most suitable, field of fire over their property. Land, or an interest in land, cannot be deemed to be taken by the Government merely because it is suitable to be used in connection with an adjoining tract which the Government has acquired, or because of a depreciation in its value due to the apprehension of such use. The mere

location of a battery certainly is not an appropriation of the property within the range of its guns.

"The petitioners' argument assumes that the guns, for proper practice, must be fired over the land in suit and, hence, that this burden upon it was a necessary incident to the maintenance of the fort. The fact of the necessity of practice firing is said to be established by the finding with respect to the line of fire over the Government's portion of the shore in which it is said that this would be sufficient 'for purposes of practice and for all other necessary purposes in time of peace.' But, in the light of other findings, this is far from affording a sufficient foundation for the conclusion upon which the petitioners insist. On the contrary, that no such necessity as is now asserted can be assumed from the mere fact that the fort is maintained is demonstrated by the facts of this case. This suit was tried in the latter part of the year 1910 and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occasions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them. It may be that practice in firing the guns would be highly desirable, but it is too much to say upon this record that the fort would be useless without it. Nor are we at liberty to conclude that the Government has taken property, which it denies that it has taken, by assuming a military necessity in the case of this fort which is absolutely contradicted by the facts proved.

"Reduced to the last analysis, the claim of the petitioners rests upon the fact that the guns were fired upon the two occasions in 1902, as stated, and upon the apprehension that the firing will be repeated. That there is any intention to repeat it does not appear but rather is negatived. There is no showing that the guns will ever be fired unless in necessary defense in time of war. We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it."

28 The new findings show that the guns at Fort Foster remained entirely unused from June, 1902, to November, 1914, when three shots were fired from the guns therein installed and five shots in 1915, causing, as before stated, no damage to the adjacent property owners, and only two of which were fired over the plaintiffs' lands, and that was through mistake of the officer in charge of the firing in determining the line between the Government reservation and the plaintiffs' lands. The land so fired over was a narrow strip in the southwest corner of said lands of the plaintiffs and containing but a few acres, including tide lands. Stated in a nutshell, the Government has installed three large and three small guns on its reservation on Gerrish Island, which reservation is adjoining the plaintiffs' lands; this battery is not intended for practice purposes but only to be fired occasionally for the purpose of testing the guns; three shots were fired from the guns in 1902, three shots in 1914,

two shots in August, 1915, and one shot in November, 1915; that all these shots since 1902 except two were fired over the Government's own property, and the two not so fired were by mistake fired over an insignificant corner of the plaintiffs' lands. The first firing above mentioned has been disposed of by this court and the Supreme Court and is only mentioned here to show whether there is an intention of the Government to take any of the plaintiffs' property. The fact that the officer in charge of these later firings staked out what he supposed to be the line between the Government's reservation and the plaintiffs' property negatives any such intention, and the fact that the gun so fired is at present so installed that it cannot be otherwise fired proves no such intention, as obviously its installation can be changed.

Ordinarily one is presumed to intend the natural and inevitable results of his own conduct, but, of course, this intention may be negatived by proper evidence. It is hardly necessary to say that the question of the intention on the part of the Government is vital in this case. Do the facts as found show an intention on the part of the Government to impose a servitude upon any part of the plaintiffs' premises? Three shots were fired in 1902 for testing purposes and the missiles passed over an insignificant part of the plaintiffs' premises; several shots were fired again twelve years thereafter for the same purpose, two of which passed over the same negligible part, and this encroachment occurred by mistake of the officer in charge of the firing as to the boundary line; there was ample room to fire all of these guns over and across Government territory. In our opinion these facts of themselves do not show any intention on the part of the Government to impose any such servitude upon the plaintiffs' land. To reinforce this opinion we have the further fact that Fort Foster was not built for the purpose of firing any of its guns over the plaintiffs' lands in time of peace or for so firing them except on its own premises occasionally for testing purposes. If these facts show any taking at all by shooting over plaintiffs' lands it is at most only a fraction of an acre in the southwest part of the plaintiffs' premises and we do not think they show even that fact.

This, in our opinion, eliminates from this case the question of the taking of the lands of the plaintiffs by shooting over them and reduces it to the question as to whether the noise, vibration, concussion, or whatever it may be called, occasioned by the firing of these guns, constitutes a taking of the lands of the plaintiffs under
29 the Fifth Amendment. The concussion arising from the occasional firing of these guns (once in 10 years or more) may be unpleasant for some people living near at hand, and when not prepared for it may do slight damage to the contents of near-by buildings, but this is not a taking of all the premises so occasionally rendered unpleasant to their inhabitants. It is but the tribute that all must pay for living near necessary Government works of this kind. At most it is but a nuisance for which the Government is not liable in this or any other court.

It has been held that railroads are a public necessity, and when

properly conducted no actionable damage accrues to adjacent proprietors from the noise, vibration, smoke, etc., thereby produced. 1 Lewis on Eminent Domain, sec. 235; Carroll v. Wis. Cen. Ry., 48 Minn. 601; Decker v. Evansville Ry., 133 Ind. 49; Beseman v. Penn. Ry., 50 N. J. L. 235; Richards v. Washington Terminal Co., 233 U. S. 546. In the latter case Pitney, J., speaking of the liability of railroads in their management, said:

"Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arising from the legalized nuisance, is held not to be a 'taking' within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. It includes the noises and vibrations incident to the running of trains, the necessary emission of smoke and sparks from the locomotives, and similar annoyances inseparable from the normal and nonnegligent operation of a railroad. Transportation Co. v. Chicago, 99 U. S. 635, 641; Beseman v. Pennsylvania R. R. Co. 50 N. J. L. 235, 240; affirmed 52 N. J. L. 221. * * *

"The immunity from liability for incidental injuries is attended with a considerable degree of hardship to the private land owner, and has not been adopted without some judicial protest. But, as pointed out by Chief Justice Beasley in the Beseman case, 50 N. J. Law at p. 238, if railroad companies were liable to suit for such damages upon the theory that with respect to them the company is a tortfeasor, the practical result would be to bring the operation of railroads to a standstill. And, on the whole, the doctrine has become so well established that it amounts to a rule of property, and should be modified, if at all, only by the law-making power." (Id., 554, 555.)

How much more is it a public necessity that the Government should construct seacoast fortifications and occasionally fire guns therefrom without having to pay for all of the lands within the reach of the report of the guns therein installed. In this connection it may be well to call attention to the fact that in this case the facts show that in many places where these fortifications are situated summer resorts are located which are doing a successful business; also to the fact that the Government is exercising proper care to cause as little damage as possible to the people living near these Government works. It is provided in the Government Coast
30 Artillery Instructions as follows:

"All Coast Artillery troops will have service practice whenever possible at their home stations," and "whenever it would be dangerous to shipping or to persons on adjacent shores to have practice at home stations * * * arrangements will be made by district commanders to have the practice at other forts."

The blast or gases from the guns when fired, as shown in Findings X and XI, passing over a few acres in the southwest corner of the

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plaintiffs' lands certainly can not be said to constitute a taking, and any discussion of that subject is hardly necessary. It certainly can not be maintained that such blasts constitute a taking of the whole or any appreciable part of Gerrish Island.

It follows from the foregoing that the petition herein should be, and the same is hereby, dismissed, and judgment entered against the plaintiff in favor of the United States for the cost of printing the record in this cause in the sum of $560.91.

Hay, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

(Here follows map marked page 31.)

32 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 25th day of February, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Portsmouth Harbor Land and Hotel Company, a corporation; Caroline E. Peabody; Amory Eliot, administrator of the estate of Mary R. Peabody, deceased; S. Ellery Jennison and Mary M. Jennison, as aforesaid, shall not have and recover any sum in this action of and from the defendants, the United States, and that the petition be and it hereby is dismissed: And it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from the Portsmouth Harbor Land and Hotel Company, a corporation; Caroline E. Peabody; Amory Eliot, administrator of the estate of Mary R. Peabody, deceased; S. Ellery Jennison and Mary M. Jennison, as aforesaid, the sum of Five Hundred and Sixty Dollars and ninety-one cents ($560.91), the cost of printing the record in said cause in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

33 VII. *Claimants' Application for, and Allowance of, Appeal.*

From the judgment rendered in the above-entitled cause on the 25th day of February, 1918, in favor of the defendants, the claimants, by their attorney, on the 28th day of February, 1918, make application for, and give notice of, an appeal to the Supreme Court of the United States.

FRANK W. HACKETT,
Attorney of Record.

Filed February 28, 1918.

Ordered: That the above appeal be allowed as prayed for.

By THE COURT.

Feb. 28, 1918.

34 In the Court of Claims.

No. 33079.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, a Corporation; Caroline E. Peabody, Amory Eliot, Administrator of the Estate of Mary R. Peabody, Deceased; S. Ellery Jennison and Mary M. Jennison, Claimants,

VS.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-en-

titled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the judgment of the Court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this first day of March, A. D., 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26372. Court of Claims. Term No. 381. The Portsmouth Harbor Land and Hotel Company et al., appellants, vs. The United States. Filed March 5th, 1918. File No. 26372.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 905.

THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, A CORPORATION; CAROLINE E. PEABODY; AMORY ELIOT, ADMINISTRATOR OF THE ESTATE OF MARY R. PEABODY, DECEASED; S. ELLERY JENNISON AND MARY M. JENNISON, CLAIMANTS,

vs.

THE UNITED STATES.

MOTION TO REMAND.

Come now the appellants, the Portsmouth Harbor Land and Hotel Company et al., and move to have this case remanded to the Court of Claims for the following purposes, namely:

First. For additions to findings 3, 4 and 5, stating what the value of the land and buildings at the time of the alleged taking would have been, if the value had not been diminished by the United States by the firing of guns from Fort Foster.

Second. For such other findings and amendments of findings as to the Court of Claims shall seem proper.

JOHN LOWELL,
Attorney for the Appellants.

April 10, 1918.

Affidavit.

I, Frank W. Hackett, of Washington, on oath depose and say that my son Chauncey Hackett was associated with John Lowell, of Boston, as counsel in the case of Peabody et al. against the United States, which was brought in the Court of Claims, for the alleged taking of land and buildings on Gerrish Island, Maine, by the firing of guns from Fort Foster in Portsmouth Harbor over the complainant's land. This case was decided by this Court, December, 1913; reported, 231 U. S., 530.

Mr. Chauncey Hackett had been associated with Mr. Lowell in preparing the case at bar which was brought in the Court of Claims after and because the guns were again fired on several occasions from Fort Foster over the land in question in the Peabody suit.

That before this case was argued in the Court of Claims Mr. Chauncey Hackett had entered the service of the United States as an officer in the Reserve Corps of the Army. He is now serving abroad. For this reason I entered an appearance as local counsel. I knew nothing of the details of the case and, of course, took no part in the argument. I had gained an impression that in the event of an adverse decision it was Mr. Lowell's wish that an appeal be taken at once to this court, because each day's delay meant a serious loss to Mr. Jennison, the claimant. Going to the clerk's office of the Court of Claims I obtained the record and went straightway to the clerk's office of this court and filed it there. Upon returning to my office I found a letter from Mr. Lowell, from Boston, stating that he was going to move to have the findings in the Court of Claims amended. Had I been aware that the Court of Claims had found the value of the same land and buildings in 1902 to be $200,000, which in the present decision they find to be worth in 1914, $125,000, I should not have entered the appeal.

Perhaps I ought to add that my son and I occupied the same law offices, and I thus came to know something of the hardship imposed upon Mr. Jennison, the claimant.

FRANK W. HACKETT.

DISTRICT OF COLUMBIA, *ss:*

Personally appearing, Frank W. Hackett made oath that the above statement by him subscribed is true.

Before me this 12th day of April, 1918.

[SEAL.] CHARLES KEENE,
Notary Public.

BRIEF IN SUPPORT OF THE MOTION TO REMAND.

If the findings in this case are not amended by stating what the value of the land and buildings alleged to be taken would have been were it not for the diminution of value caused thereto by the firing of guns from Fort Foster, the appellants if successful in this appeal would recover the value only of the property after the damage had been done by the United States.

By parity of reasoning, if the property had been destroyed by the action of the United States the appellants would recover nothing.

The only alternative would be for this court, after decision in favor of appellants, to thereupon remand the case to the Court of Claims to have the findings made which is here prayed for.

JOHN LOWELL,
Attorney for Appellant.

(37184)

Supreme Court of the United States

OCTOBER TERM, 1918.

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THE PORTSMOUTH HARBOR LAND AND HOTEL COMPANY, A CORPORATION; CAROLINE E. PEABODY; AMORY ELIOT, ADMINISTRATOR OF THE ESTATE OF MARY R. PEABODY, DECEASED; S. ELLERY JENNISON AND MARY M. JENNISON, *Appellants*

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF FACTS.

The property of the petitioners as stated by Mr. Justice Hughes in the Peabody case, which was decided in December, 1913, and reported in 231st U. S., 530, consists of about 200 acres of land forming the southern corner of Gerrish Island, the southernmost point on the coast of Maine. It is beautifully diversified by forests, glades, open fields and meadows, with beaches and rocks where it borders on the Atlantic Ocean. It lies about three miles from Portsmouth and has a frontage of more

than a mile on the ocean and on the west it borders on the entrance to Portsmouth Harbor. "Its value consists almost entire in its adaptability for use as a summer resort and it had been improved for this purpose by the erection of a hotel, cottages and outbuildings and pier, by the construction of roads and by the provision of facilities for summer recreation."

Fort Foster, a fortification consisting of three ten-inch guns and two three-inch rapid-fire guns, and which was to be one of the outer line of defences of Portsmouth Harbor, was constructed upon a tract of 70 acres lying north and west of the land in suit and abutting upon it. For this fortification appropriation was made in 1873. In May of that year the land was purchased and the construction of the battery was begun and continued into 1876, when the work was suspended. In 1898 work was resumed and the installation of the batteries completed about June 30, 1901. One of the guns cannot be fired without the shot passing over the petitioners' land.

In 1902 one shot was fired from each of the three guns and no more shots were fired until after the decision of the Peabody case. Shots were fired again in November, 1914, and in August, 1915, and in November, 1915, two of which went over the land of the petitioners.

In the present case there was evidence introduced that a fence was maintained from 1876 to 1902 between high and low water mark, extending the southerly line between the Fort Foster reservation and the petitioners' lands; the time of the erection of the fence not having been proved.

In findings 3, 4 and 5, the value of land and buildings was taken as of November, 1914, and no findings were made of the values in 1902 before the guns were fired.

The Court of Claims dismissed the petition and this appeal was taken.

ARGUMENT.

THE FACTS SHOW THAT THE PETITIONERS' LAND HAS BEEN TAKEN.

In the Peabody case Mr. Justice Hughes said: "It may be assumed that if the Government had installed its battery not simply as a means of defence in war but with the purpose of subordinating the strip of land between the battery and the sea to the right and privilege of the Government to fire projectiles directly across it for the purpose of practice or otherwise whenever it saw fit in time of peace, with the result of depriving the owner of its profitable use, the imposition of such a servitude would constitute an appropriation of property for which compensation should be made. The subjection of the land to the burden of governmental use in this manner might well be considered to be a taking within the principle of the decision."

It was held, however, that not enough was shown by the firing of the guns once each, to establish the intention of the Government to impose a servitude.

Mr. Justice Hughes towards the end of the opinion said, "That there is any intention to repeat it [*i.e.*, the firing of the guns] does not appear but rather is negatived; there is no showing that the guns will ever be fired unless in necessary defence in time of war."

The question in this case then is, whether the facts show such an intention and that a taking has been made. The firing of the guns in 1902 materially impaired the value of the petitioners' property and the firing in 1914 and 1915 rendered it impossible to do anything further with the property.

The maintenance of the fence from 1876 to 1902 on the southerly line between Fort Foster and the petitioners' land, is of significance as showing that the petitioners and everybody in the neighborhood understood this to be the true boundary line, and nobody knew of the arbitrary division of flats as laid down in *Emerson* v. *Taylor*.

What is of far greater significance is, that while in the Peabody case it was not proved that Fort Foster would be used again as a fort, or that the guns would ever be fired again in time of peace, in this case they were again fired on three different occasions, with the result that the petitioners' property, seriously injured by the firing in 1902, by the firing in 1914 and again in 1915, was irretrievably destroyed as a summer resort.

The contention of the Government that two of the guns can be fired without the shots passing over the land of the petitioners, while true, is not material. The most suitable field of fire is over the petitioners' land and if used in times of peace shots must be so fired in order even properly to test the guns. This was done in 1915.

The Court of Claims' findings and opinion seem to proceed upon the theory that even although the firing of the guns from Fort Foster materially impaired the value of the petitioners' property, yet as they were fired over but a small corner of the land there was no taking of the property; it was at best a taking of an insignificant part of their land, which was of but little value. The attitude of the Court of Claims was shown by its findings of the value of the land and buildings when the guns were fired in 1914, with no finding of the value before the guns were fired in 1902. The logic of their position is, as I said in my brief in support

of the motion to remand, that if the property of the petitioners had been destroyed by the action of the United States, the appellants could recover nothing.

We submit that the facts of this case show conclusively that Fort Foster is intended to be used as a fort and that under the Peabody decision the land has been taken and compensation must be made therefor.

We respectfully submit that the judgment of the Court of Claims should be reversed.

JOHN LOWELL,
FRANK W. HACKETT,

Attorneys for The Portsmouth Harbor Land and Hotel Company, a corporation; Caroline E. Peabody; Amory Eliot, Administrator of the Estate of Mary R. Peabody, deceased; S. Ellery Jennison and Mary M. Jennison.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

THE PORTSMOUTH HARBOR LAND AND Hotel Company, a corporation; Caroline E. Peabody; Amory Eliot, administrator of the estate of Mary R. Peabody, deceased; S. Ellery Jennison and Mary M. Jennison, appellants,
v.
THE UNITED STATES.

No. 905.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEE'S MEMORANDUM IN REPLY TO APPELLANTS' "MOTION TO REMAND."

Comes now the United States, appellee in the above-entitled cause, by its Solicitor General, and for answer to appellants' "motion to remand" sets forth as follows:

I.

That in the petition in the court below (par. 10) appellants alleged that—

> On or about November 23, 1914, the United States took said land for the public use by discharging all of the said guns over and across it * * * ;

and further alleged (par. 11)—

> That the value of the claimants' land taken as aforesaid, is fairly and reasonably not less than seven hundred thousand dollars ($700,000) of which sum claimants as aforesaid have received no part in compensation.

That there was no allegation of a taking other than the aforesaid in said petition.

That the court found the said lands to be worth at the time of the alleged taking in 1914, $125,000.

That in the case of *Peabody* v. *The United States*, 231 U. S. 530, 540, a suit over the same property alleged herein to have been taken, this court declared that:

> * * * This suit was tried in the latter part of the year 1910 and it appeared that none of the guns had been fired for over eight years. When the suit was brought in 1905, nearly two years and a half had elapsed since the firing of a shot. The guns have been fired only upon two occasions, or three times in all, and this firing took place in 1902, shortly after the installation of the guns, for the purpose of testing them.
>
> * * * We deem the facts found to be too slender a basis for a decision that the property of the claimants has been actually appropriated and that the Government has thus impliedly agreed to pay for it.

That the sole question before the Court of Claims and now before this court is whether or not appellants' property was taken by the firing of the guns in 1914, and, if so, its value at that time. The court

found the value at said date. The purpose of appellants' motion is to remand the case to the Court of Claims in order to have said findings 3, 4, and 5 amended so as to show the value of the property in 1902 before guns were installed or fired. Such amendments showing value would be wholly immaterial for the reason that there is no allegation in the petition of a taking other than in November, 1914, and for the further reason that the court has already held in *Peabody* v. *The United States, supra*, that there was no taking in 1902.

II.

That appellants' motion to remand in order to amend the findings of fact is improperly made at this time. Previous to the granting of the appeal by the Court of Claims, and before the latter lost jurisdiction of the case, appellants had their opportunity. It is now too late for appellants to move for a new trial, which the granting of this motion would in effect compel the Court of Claims to allow.

III.

Wherefore, it is submitted that the said motion should be denied.

JOHN W. DAVIS,
Solicitor General.
HUSTON THOMPSON,
Assistant Attorney General.

APRIL, 1918.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE PORTSMOUTH HOTEL, ETC., COMPANY ET AL. v. THE UNITED STATES. } No. 381.

ON APPEAL FROM THE COURT OF CLAIMS.

MEMORANDUM SUBMITTED BY THE UNITED STATES.

Under leave obtained, the United States submits this memorandum respecting the contention advanced by counsel for appellant upon oral argument that certain acts of entry upon claimants' land, not covered by findings of the Court of Claims, show a taking of that land by the United States.

1. There is no mention whatever of the subject matter referred to by counsel—

(*a*) In the petition, which relies solely upon the training and firing of the guns at Fort Foster. (R. 8.)

(*b*) In any request for findings of fact addressed to the Court of Claims at any time *either prior or subsequent* to its announcement of its decision.

(*c*) In any finding by the Court of Claims, or in its opinion.

(*d*) *In the motion filed in this court to remand.*

(*e*) In appellants' brief in this court.

2. The testimony read to the court appears on pages 430–431 of the printed transcript of the evidence filed below. It had already appeared (transcript, 49, 50) that in 1906 the Government had sought permission of claimant Jennison to do something on his land in the way of establishing fire-control stations for Fort Constitution (not Fort Foster, the battery here) and that upon claimants' refusal the project had been wholly given up.

Inspection of the present testimony shows that the acts referred to occurred in April and in September of 1917, long after the petition herein, which was not sought to be amended, was filed and *after the declaration by this country of war upon Germany*. Exactly what is claimed by Jennison to have been done was to open a clogged up drain, to run an electric cable across the land to certain points and to erect a small hut out of odds and ends of lumber. It is also complained that soldiers entered the abandoned hotel but if so there is absolutely no showing that it was done by the authority of the United States. The hut was about 10 feet square. (Transcript, 432.)

The testimony read was disputed in certain respects. (Testimony W. T. Goodale, transcript, 441, 442.) And it appeared that what was done was done under color of express permits given to the United States by the Saco & Biddeford Savings Institution (transcript, 440, 450), understood by the United States to be the record holder of the title to the land

upon which the acts which related primarily to the location of searchlights and an observing station were done. The transcript (pp. 444, 450) contains the documents under which the savings institution as foreclosing mortgagee and as the owner of a tax title, was thought by the United States to own the property upon which the acts were done. The permits suggest what the testimony of Maj. Hase (421–429) and the character of the acts themselves also indicate, that the matter was an entirely temporary incident of the conduct of the war, although no doubt some observation station in the locality might be desirable as a matter of permanent instalation.

Presumably the Court of Claims, if it deemed the matter brought properly to its attention or thought it material concluded that the United States was right in its assertion that the acts were done under express permission of the person owning the property at the time in question. And this apart from the fact that the acts were done in war.

In any event, it is submitted that it is going very far to assert a taking of this whole property upon the basis of these trifling invasions of unoccupied premises. And that the question was not properly before the Court of Claims or before this court.

In view of certain questions asked at the argument and of the difficulties of deciphering the chart placed in the record, the United States has filed with the clerk of this court two prints of a photograph which was defendant's Exhibit 1 in the court below. They show the guns in the position in which

they were in 1914 and 1915. The flag which was erected to mark the limit of claimants' land (but in fact was placed some yards too far inland) appears at the place where it was erected. The position of Whalesback Lighthouse, the facing of the battery, the zone of fire available to the fort without passing over claimants' land are all clearly indicated thereby.

At the request of counsel for appellants, there is filed also the testimony, read by him to the court for such assistance if any, as it may afford.

LaRue Brown,
Assistant Attorney General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE PORTSMOUTH HARBOR LAND AND Hotel Company, a Corporation; Caroline E. Peabody; Amory Eliot, Administrator of the Estate of Mary R. Peabody, Deceased; S. Ellery Jennison and Mary M. Jennison, Appellants,

v.

THE UNITED STATES.

No. 381.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This is an appeal from the judgment of the Court of Claims dismissing the claimants' petition to recover the value of certain land alleged to belong to the claimants and to have been taken by the United States in the exercise of its power of eminent domain.

On August 20, 1902, the Portsmouth Harbor Land & Hotel Co., acquired by conveyance a tract of land of about 200 acres forming the southern corner of Gerrish Island, Me. It borders the Atlantic Ocean

on the south and east and on the west the entrance to Portsmouth Harbor. The land is of little value except for use as a summer resort. A hotel, cottages, outbuildings, and a pier were erected on the land prior to 1895. The hotel and property were used as a summer resort up to the end of the season of 1904. (Findings II, III, and XVIII, R. 12, 13, 18.)

On June 21, 1915, the Saco & Biddeford Savings Institution, which held a mortgage upon the easterly 155 acres of the land, foreclosed and the mortgagor's right of redemption has since expired. The value of the land thus foreclosed is $75,000, the value of the remaining westerly portion of the tract being $50,000. The Saco & Biddeford Savings Institution is not a party to this suit. (Findings IV and V, R. 13, 14.)

In 1873 the United States began the construction of a 12-gun battery upon a tract of land of approximately 40 acres lying immediately to the north of the western portion of the claimant company's land. In 1876 work was suspended on account of lack of appropriations, but in 1898 work was resumed. A battery of three 10-inch guns and of two 3-inch rapid-fire guns was installed in 1901, and the fortification was transferred to the artillery, being named Fort Foster. (Finding VI, R. 14, 15.)

In erecting Fort Foster it was not the intention of the Government to fire any of its guns over any of the claimants' land in times of peace. The only firing intended was occasionally for testing purposes, and then only over the Government's own premises. (Finding XV, R. 18.)

In fact, Fort Foster was never garrisoned and no target practice has ever taken place there. Until the summer of 1917, when its guns were dismounted and removed its batteries were kept in condition by a small detail from a fort just across the harbor from Fort Foster. It has been the settled policy of the military authorities not to train gun crews at all its coast fortifications. (Finding VIII, R. 16.)

On June 20, 1902, two shots, and on September 26, 1902, one shot, were fired for testing purposes. The shots passed over the western extremity of the claimants' land. (Finding IX, R. 16.) The claimants in 1905 brought suit in the Court of Claims on the ground that their land had been taken by the United States for public use. (*Peabody* v. *U. S.*, 46 Ct. Cl. 39.) Judgment of the Court of Claims dismissing the petition was affirmed on appeal to this court. (*Peabody* v. *U. S.*, 231 U. S. 530.) The holding was that the three shots fired did not constitute an appropriation of the land, and that it was not established that the United States intended to impose a servitude on the land by firing across it for practice purposes. (R. 19, 23, 24.)

On November 23, 1914, one shot was fired from gun No. 1 and two shots from gun No. 2. On August 26, 1915, two shots were fired from gun No. 3, and on November 19, 1915, one shot was fired from gun No. 2. These shots were fired for the purpose of testing certain modifications which had been made in the gun carriages. No further shots have been fired up to the present time. (Finding IX, R. 16.)

In *Peabody* v. *U. S.*, *supra*, it was decided that the boundary line between the claimants' and the Government's lands over the flats between high and low water was obtained by making an equitable division of the flats according to the rule established by the Maine courts. This is shown by the line A to F on the plat printed opposite page 26 of the record. If the boundary line is so determined the only shots since 1902 which passed over claimants' land were the two shots fired from gun No. 3 in August, 1915. Approximately half an acre of land of insignificant value, only half of which was above high water, was so fired over. (Finding XI, R. 17.)

The Court of Claims in this case held that certain new evidence offered did not show any reason for changing the determination made in the *Peabody case* as to the proprietorship of the tidewater lands. The boundary line was there determined from the call of the deed to the United States.

Before the shots of 1914 and 1915 were fired the officer in charge placed a flag on what he believed to be the line between the Government's and the claimants' lands, and he directed the gunners to fire so that the missiles would all pass over the Government lands. (R. 22.) It was due to a misunderstanding on the part of the officer as to the boundary line that the flag was misplaced and two shots passed over a portion of claimants' land. (Finding XII, R. 17.) Accepting the boundary established by the *Peabody case*, guns No. 1 and No. 2 can be safely

fired to sea over only Government land, and gun No. 3 can be so fired at long-range distances. (Finding VII, R. 15.)

It appeared also that before the firing the occupants of the structures on claimants' lands were notified of what was intended and warned to take measures accordingly.

The hotel and property here in question were successfully operated during the season of 1902, and during the season of 1903 there were the usual number of guests and tenants. The season of 1904 was financially unsuccessful, and partly for that reason and partly on the advice of counsel in the *Peabody case*, operation of the property as a summer resort was thereafter discontinued. (Finding XVIII, R. 19.) There are numerous successfully operated summer-resort hotels and properties in the United States situated with reference to coast-defense batteries of heavy guns substantially as the claimants' property is situated. (Finding XVI, R. 18.) The firings of 1914 and 1915 do not appear to have caused any damage to the claimants' buildings or other improvements. (Findings IX, R. 16.)

ARGUMENT.

I. CLAIMANTS' LAND WAS NOT "TAKEN" BY FIRING OVER IT.

A. Use which is not shown to have been intentional does not constitute a "taking" which will support recovery.

The Court of Claims, after considering such new evidence as was offered to it, found that it had no occasion to alter the determination reached in the former case (46 C. Cls. 39) as to the ownership by the United States of a portion of the shore sufficient to permit the firing of the guns in question without shooting over claimants' land. It determined the boundaries from the call of the deed to the United States (R. 22) by applying the local law governing the boundary lines of contiguous proprietors where there is a curve of the shore. (Comp. *Peabody* v. *United States*, 231 U. S. 530, 537.)

With the boundaries thus determined, it found not only that all the guns here in question could be fired without passing over claimants' land, but also that in fact only two shots had been fired over claimants' land since the firing in 1902, which was the subject of the earlier decision approved by this court in the *Peabody case*. These two shots, fired in 1915 from what is called gun No. 3, passed over a corner of claimants' land found (R. 17) to be of trifling value.

Unless this "use" of claimants' land was intentional on the part of the Government it could at best constitute a tortious act of the Government's officers. Such an act will not support recovery in the Court of Claims as for a taking.

For a taking there must be the essential elements of contract. It may be implied where there has been intentional authorized use of what is recognized to be the property of another as in *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645. But even where the use is intentional, if it is made without any recognition of any adverse interest in the property, there is no intention to appropriate and no "taking" such as to impose a liability in contract will be implied. (*Russell* v. *United States*, 182 U. S. 516; *Harley* v. *United States*, 198 U. S. 229.) In *Schillinger* v. *United States*, 155 U. S. 163, this court pointed out that the Government had proceeded with respect to the claimant's property at all times as if it were its own property, and held that the claim was one sounding in tort, and indeed that the facts disclosed a tort. Recovery was refused. In *Harley* v. *United States*, 198 U. S. 229, recovery was denied in a case where the officers of the Government understood that they were using a device belonging to the claimant, but also supposed that the owner, who happened to be an employee of the Government, would not expect remuneration. It was held that there was no coming together of the minds of the parties, and that there was therefore no taking which would support a recovery.

Manifestly a case where the use made by the Government is wholly unintentional is very much weaker from the point of view of the claimants than those just referred to.

B. There was here no intentional use of claimants' land.

And so it had been said in the former case (*Peabody* v. *United States*, 231 U. S. 530) that the decisive question was whether it was shown that the Government intended to impose any servitude upon the claimants' lands by firing across them from time to time during periods of peace. It was held that building the fort and firing the shots fired in 1902 did not establish such an intention.

In the present case the findings of the Court of Claims dispose of such a contention. It is found that under the practice of the War Department and the appropriate regulations practice firing is not done at fortifications like these. (R. 46) It is found that the only firing of these guns subsequent to that of 1902 was for the purpose of testing modifications of their installation. It is found that the shots fired were fired over the Government's own land with the exception of two shots. (R. 47.) It is found that special precautions were taken to avoid any firing over claimants' land, and that these precautions were supposed to have been adequate, and that the trespass involved in the two shots which did pass over a corner of claimants' land was the result of an error.

In view of these specific findings the Court of Claims correctly passed over the contention that gun No. 3 is now so installed that it can not be fired entirely over Government land except at long-range

distances. In view of the showing that no intention is shown to fire the gun for practice purposes in times of peace or for any purpose except perhaps for occasional tests when changes are made, this fact is without significance. As the Court of Claims points out the installation can be changed. But apart from that no reason is shown why firing at long range distances is not perfectly satisfactory for the testing purposes for which the gun is to be fired, if it is fired.

The claim is of a taking in 1914. In view of the absence of amendment to the petition, it is noteworthy that this firing of gun No. 3 was in 1915. It is not without significance that the guns were removed for more urgent use elsewhere in 1917. Whether they will be restored, and if so how they will be mounted, is a problem of the future.

II. Claimants' Land was not "Taken" by Occasional Test Firing Over the Government's Own Land.

Whatever might be said of the necessities of a broad field of fire for adequate target practice, that question does not arise here in view of the specific findings already referred to that practice firing is not contemplated at stations like this. For the purpose of occasional shots with a view to testing the guns or their mounts it is obvious that it is enough if there is a zone through which the projectiles can pass.

In the *Peabody case*, supra (538), discusses what practice firing "directly across" claimants' land might

be said to be a taking. But it also said, still speaking of practice firing (539):

> Land, or an interest in land, can not be deemed to be taken by the Government merely because it is suitable to be used in connection with an adjoining tract which the Government has acquired or because of a depreciation in its value due to the apprehension of such use.

This was directly in response to the suggestion that the claimants' land afforded a field of fire necessary to "proper practice," to which the Government had answered that it could do whatever firing it wished to do over its own land. It is apparent from the decision and from the cases cited therein (538) that any ill effects upon claimants' land from occasional test firing over the Government's own land was "merely consequential damage incident to a public undertaking which must be borne without any right to compensation. (538.)

The rule of law here applicable was carefully stated in *Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 554:

> Any diminution of the value of property not directly invaded nor peculiarly affected, but sharing in the common burden of incidental damages arizing from the legalized nuisance, is held to be not a "taking" within the constitutional provision.

III. The Firing Shown in the Record has not in Fact Deprived Claimants of the Use and Enjoyment of Their Land.

It is here found (R. 18) that in the season of 1903, which followed the firing held in the *Peabody case, supra*, not to have been a taking, claimants' hotel enjoyed its normal patronage. It was given up after a bad season in 1904, partly on advice of counsel in that case (R. 19), but no further firing had intervened. It has apparently not been used for resort purposes since. It is also found that numerous successful summer resort hotels are in situations like that of claimants' land. (R. 18, Finding XVI.) Finally, it is found as a fact that no damage to the buildings or other improvements on claimants' land resulted from the firing here relied upon. (Finding IX, R. 16.)

It follows that claimants have not been deprived of the use or enjoyment of their land. The alleged basis for the right asserted is therefore lacking. (*Richards* v. *Washington Terminal Co.*, 233 U. S. 546, 552.)

CONCLUSION.

The judgment of the Court of Claims should be affirmed.

LaRue Brown,
Assistant Attorney General.
Chas. H. Weston,
Attorney.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1918.

PORTSMOUTH HARBOR LAND & HOTEL COMPANY ET AL. *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 381. Argued May 1, 1919.—Decided May 19, 1919.

Additional discharges of projectiles over part of plaintiff's land, *held* not to involve a taking of property. *Peabody* v. *United States*, 231 U. S. 530.
Applications for remand and for additional findings denied.
53 Ct. Clms. 210, affirmed.

THE case is stated in the opinion.

Mr. John Lowell, with whom *Mr. Frank W. Hackett* was on the brief, for appellants.

Mr. Assistant Attorney General Brown, with whom *Mr. Charles H. Weston* was on the brief, for the United States.

Memorandum opinion by THE CHIEF JUSTICE.

Recovery was sought in the court below from the United States for property taken by it as the result of the alleged firing of guns in a fortification on the coast of Maine and the passing of the projectiles over and across

a portion of the land alleged to have been taken. The court finding that a former case by it decided against the owners and here affirmed (*Peabody* v. *United States*, 231 U. S. 530), for taking of the same land resulting from instances of gun fire resulting from the same fort and guns, was identical with this, except for some occasional subsequent acts of gun fire, held that case to be conclusive of this and rejected the claim on the merits.

Coming to consider this action of the court in the light of the findings by it made, we are constrained to the conclusion that it was right and that no possible difference exists between this and the *Peabody Case*. Before applying this conclusion we say that we find that the record discloses no ground for the applications here made to remand and for additional findings.

Judgment affirmed.